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In The
**Supreme Court of The United States**
October Term 1994

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THE GILLETTE COMPANY,
*Petitioner,*

v.

MICHIGAN DEPARTMENT OF TREASURY,
*Respondent.*

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**On Petition For A Writ Of Certiorari To The Michigan Court of Appeals**

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# PETITIONER'S REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION

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## REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

With few exceptions, the arguments of Respondent, the Michigan Department of Treasury ("Department"), either miss or avoid the issues raised by the Petitioner, The Gillette Company ("Gillette"). A reply to several of its new arguments, pursuant to Rule 15.6, is therefore necessary.

### A. The Department's Assertion That "Due Process" Only Requires That Gillette Be Treated The Same As "All Pending Litigants" Is Wrong

The Department states, at p 53 of its Brief for Respondent in Opposition ("Brief"),

> "Gillette's argument that it cannot be treated differently from other businesses for the years 1976-1981 concerning what nexus standard was applied has no merit. Due Process only requires that Gillette be treated the same as all pending litigants. Harper, 125 L.Ed.2d at 86." (Emphasis added)

This assertion by the Department is critical to its attempt to justify the State's unconstitutional enforcement of a

different Single Business Tax ("SBT") jurisdictional standard against Gillette. This is so because the Department admits, at p 54 of its Brief, that it cannot constitutionally apply the new jurisdictional standard to others similarly situated. Here, Gillette and the Department agree. If the Department is constitutionally required to apply the same SBT jurisdictional test to all similarly situated persons for the years here at issue, it cannot do so.

The Department, in asserting that it need only apply the decision of this Court retroactively with respect to other pending litigants, misreads Harper v. Virginia Dept. of Taxation, 509 U.S. ____, 113 S.Ct. 2510 (1993).[1] Justice Thomas' Opinion in

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[1]The Department again misreads Harper at p 57 of its Brief, in stating,

> "In Harper, this Court specifically recognized that its decisions could only be applied retroactively to "all cases still open on direct review. . .".

Harper did not hold that equal protection requires this Court's decision be applied only to other pending litigants. Retroactive application must also apply to persons who could, consistent with applicable state practice and procedure, become parties litigant (Id., 2516-18).

Clearly, even if applicable here by analogy, this Court's recent decisions on the retroactive effect of its opinions dealing with the constitutionality of state laws have been misread by the Department.[2]

The Department also attempts to rely upon what it perceives to be "inherent

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[2]In James B. Beam Distributing Co. v. Georgia, 501 U.S. ___, 111 S.Ct. 2439, 115 L.Ed.2d 481, 488 (1991), Justice Souter, explaining how a fully retroactive decision would be applied, stated,

> "First, a decision may be made fully retroactive, applying both to the parties before the Court and to all others by and against whom claims may be pressed, consistent with res judicata, and procedural barriers such as statutes of limitations. This practice is overwhelmingly the norm." (Emphasis added)

Subsequently, at p 493, Justice Souter refused to distinguish between the application of a Supreme Court decision to parties litigant and to others who had not yet become parties litigant.

limitations upon the retroactive application of judicial decisions." Such "inherent limitations" are established by statutes of limitations and by the doctrine of res judicata. Neither of these "inherent limitations" is applicable in the instant case."

B. **The Issues Raised by Gillette Involve Gillette's Constitutional Rights and Are Not, Therefore, Questions of State Law**

The Department argues that correcting an "administrative interpretation" and applying "the proper nexus standard" to a pending litigant, are questions of state law. It asserts that the State therefore has the authority to determine the retroactivity of its court's decisions (Department's Brief, pp 46-47).

The response is simple. Obviously, the State can determine the extent its courts' decisions are to be given retroactive effect. But it cannot in doing so

ignore rights protected under the Federal Constitution. This Court in Beam (115 L.Ed.2d at 487-488), through Justice Souter, clearly stated that there are federal constitutional restrictions upon the "backward" application of a state judgment. The Court noted,

> Once the rule is found to apply 'backward' there may then be a further issue of remedies, i.e., whether the party prevailing under a new rule should obtain the same relief that would have been awarded if the rule had been an old one. Subject to possible constitutional thresholds, see McKesson Corp v. Florida Alcoholic Beverages and Tobacco Div, 496 US ___, 110 L Ed 2d 17, 110 S Ct 2238 (1990), the remedial inquiry is one governed by state law, at least where the case originates in state court." (Emphasis added)

It is precisely these "constitutional thresholds" upon which Gillette here premises its petition for a writ of certiorari.

The Court of Appeals knew or should have known that its new jurisdictional test

could not constitutionally be imposed on others similarly situated.

This Court in McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, 496 U.S. 18, 40-41, 110 S.Ct. 2238 (1990), noted that a state could assess and collect back taxes from those favored by an unconstitutional discriminatory tax levy or collection practice, and thereby eliminate the discrimination only ". . . to the extent consistent with other constitutional restrictions. . ." This Court there clearly highlighted the problem with the retroactive imposition of a significant tax burden beyond some "temporal point" which would deny Due Process, and the problem of being unable to assess and collect such a retroactive tax against others similarly situated, which would deny Equal Protection (496 U.S. at 40, fn. 23).

**C. The Department Did Not Adopt PL 86-272 As The Applicable SBT Jurisdictional Test By Mistake**

One argument advanced by Gillette in its petition for certiorari was that Michigan's longstanding 13-year published administrative policy of using PL 86-272 as its SBT jurisdictional test had become established as the law in Michigan, and, accordingly, Gillette was denied equal protection under this established law by the Court of Appeals' sua sponte adoption of a different and less favorable standard. (Gillette's Petition, pp 12-21) The Department, in an abrupt change of position, now argues for the first time, that it had erroneously adopted and applied its longstanding PL 86-272 jurisdiction policy, and that this "mistake" could be corrected by the Michigan Court of Appeals.[3]

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[3]The Department argues, for example, "Gillette's claim is simply that the Michigan Court of Appeals should have continued to apply the erroneous administrative nexus standard instead of the Due Process/Commerce Clause nexus standard." (Department's Brief, p 36)

Michigan did not, as the Department would now infer, adopt the PL 86-272 administrative jurisdictional policy as the jurisdictional test to be applied only so long as it reflected contemporary Due Process/Commerce Clause nexus standards. This is not what the Michigan Revenue Department Bulletins said. The Department's statements on brief that it believed PL 86-272 reflected the Due Process/Commerce Clause nexus test which the courts would have applied are not supported by the evidence in the record.[4]

Nor is this mutation of the Department's position consistent with its actions. If the Department's assertion as to its intent were true, it would have

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[4]Frederick Lynch, Michigan's SBT Administrator, while discussing the adoption of the PL 86-272 administration policy, testified at trial in this matter, on examination by the State, "PL 86-272 is more restrictive on the State than the court cases set forth in Northwest Portland." (See Gillette's Petition for Writ of Certiorari, App. 251)

submitted appropriate briefs to the Michigan Court of Appeals after this Court's decision in Quill Corp. v. North Dakota, 504 U.S. ___, 112 S.Ct. 1904 (1992), notifying that court that the Department's assumption that PL 86-272 stated the applicable Due Process/Commerce Clause jurisdictional nexus test was incorrect. Quill unequivocally established that the Due Process/Commerce Clause jurisdictional requirements were far more permissive than PL 86-272. The Department did file a second supplemental reply brief after Quill was decided. It never mentioned Quill.

Further, the Department argues at pp 14-15, that

> "Until this Court's decision in 1992 in Wrigley, it was the Department's position that PL 86-272 established the minimum nexus standards for constitutional due process. . . After Wrigley, however, the Department's argument that PL 86-272 incorporated and was coextensive with the minimum nexus standard suggested in

> Northwestern Portland Cement was no longer viable. In Wrigley, this Court held that PL 86-272 was a retreat from the nexus standard suggested in Northwestern Portland Cement."

The Department never raised this argument in the Michigan Courts. The so-called "Department's position" referenced is also contradicted by the circumstances surrounding this appeal. In the Department's reply to Gillette's second supplemental brief in the Michigan Court of Appeals, filed August 21, 1992, the Department analyzed the then recent decision in Wisconsin Dept. of Revenue v. Wrigley Co., 505 U.S. ___, 112 S.Ct. 2447 (1992), handed down after Quill. But the Department did not ask that the longstanding PL 86-272 jurisdictional standard be found to be incorrect, or be changed. Quite the contrary, it continued to ask that PL 86-272 be applied as the applicable jurisdictional test. Indeed the Department, in that brief, recognized that PL 86-272 might protect otherwise taxable

activity, but the Department specifically stated this was not an issue in this appeal (Appendix A, App. 1).

D. **The Department's Brief Confuses the Jurisdictional "Nexus" For The Apportionment Sales Factor "Throw Back" Test With The Jurisdictional "Nexus" Test Required For The Department To Assert Jurisdiction To Tax Under The SBT**

There are two different jurisdictional tests (called "nexus" by the Department) required to be applied in the administration of the SBT Act. The first test at issue here, is applied to determine if the SBT can be imposed on a potential taxpayer from another state. Michigan, by long-standing administrative policy, adopted PL 86-272 as the proper jurisdictional "nexus" test to be uniformly applied.

The second jurisdictional test is applied in determining whether another state could tax a Michigan taxpayer selling and shipping goods to that state. If the other state had no jurisdiction to tax, the

sales to that state were "thrown back" to the numerator of the taxing state's sales factor fraction, increasing the tax base apportioned to that state for taxation.

The Michigan SBT Act provided that the other state would be deemed to have jurisdiction to tax, whether it actually levied a tax or not, if it could have done so under either an income type tax (bringing the PL 86-272 test to bear) or other non-income types of taxes, such as a corporate franchise tax, a business privilege tax, or a single business type tax (MCL 208.42, MSA 7.558(42)). The Department attempted to ignore the alternative tests and looked only to the PL 86-272 jurisdictional test. But Michigan taxpayers succeeded in establishing that Michigan could not by

administrative fiat ignore the Section 42 alternative "throw back test."[5]

The Department unfortunately sometimes fails to distinguish between issues involving the alternative "nexus" (jurisdiction tests) for purposes of the sales factor "throw back" determination, and the "nexus" (jurisdictional test) adopted for purposes of determining Michigan's own jurisdiction to tax.

For example, at p 11 of its Brief, the Department states,

> "Although Gillette claims that it was surprised by the Court of Appeals [sic] analysis of the proper nexus standard, the question concerning the

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[5]Notwithstanding the Department's current argument that it believed PL 86-272 codified the Due Process/Commerce clause tests until the 1992 Wrigley decision, Michigan taxpayers have for many years been arguing that the alternative Due Process/ Commerce Clause constitutional "throw back" jurisdictional test was different and that it is much easier to establish jurisdiction to tax under these test than under PL 86-272. For example, the taxpayers Guardian Industries Corporation and Cargil Incorporated, involved in Guardian Industries Corp v. Dep't. Treasury, 198 Mich. App. 363, 499 N.W.2d 346 (1993), as noted in that opinion, were advancing this proposition with respect to the years 1982-1985 and 1982-1983, respectively.

> applicability of PL 86-272 to the SBT was well known", citing Amway Corp. v. Department of Treasury, 176 Mich. App. 285, 438 N.W.2d 904 (1989) vac and rem 433 Mich. 908 (1989).

The Amway case dealt only with the alternative jurisdictional tests specified by section 42 of the Act.[6]

Subsequently, in an effort to argue that the State had not in fact discriminated against Gillette by subjecting it alone to the new Quill jurisdictional test, the Department states at p 52 of its Brief,

> "[I]ndeed, in a subsequent unpublished opinion, the Michigan Court of Appeals did apply the Due Process/Commerce Clause nexus standard in an open case involving the years 1979 through 1981 even though the Department and the Tax Tribunal had applied PL 86-272. Michigan Chrome and Chemical v. Department of Treasury, Court of Appeals Docket No. 137977 (1/4/94); 2 CCH Mich Tax Rep ¶ 400-322, pp 31.4833-31.434"

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[6]Indeed, the Michigan Supreme Court vacated and remanded with respect to the Court of Appeals' decision holding that solicitation alone could not establish Kentucky jurisdiction to tax. Unfortunately the case was then settled (433 Mich. 908 (1989).

This statement is also misleading. In the unpublished Michigan Chrome opinion, the issue was the "throw back" nexus jurisdictional test, and the court followed its earlier ruling in Guardian, that the Department could not force the taxpayer to look only to the PL 86-272 test, when the statute specifically gave it the alternative of looking to the more easily met Due Process/Commerce Clause test. The state's longstanding administrative policy of applying PL 86-272 to determine its jurisdiction to tax was not at issue, and was not even discussed in that case (Appendix B, App. 5).

**E. The Department's Assertion That "Gillette Was Well Aware Of The Controversy Concerning The Appropriate Nexus Standard" Is Also Not True**

The Department asserts, at p 48-49 of its Brief, quoting a section heading in Gillette's original brief in the Michigan Court of Appeals,

> "Gillette was well aware of the controversy concerning the appropriate nexus standard. Contrary to Gillette's claim in its petition for writ of certiorari, Gillette did discuss the question of the application of the Due Process/ Commerce Clause standard instead of PL 86-272."

There was never a controversy concerning the appropriate SBT Act jurisdictional ("nexus") standard. The Department's statement is not true. Gillette had informed the Court of Appeals, following the caption quoted by the Department, that there was no issue as to the applicable jurisdictional test (Appendix C, App. 9). In its brief in response, the Department confirmed Gillette's assertion that the PL 86-272 test must be applied, and that there was no controversy over which jurisdictional test to apply (Appendix D, App. 12).

**F. The Department's Argument That The Court Of Appeals Was Right For The Wrong Reasons**

Over one-third of the Department's Brief is devoted to the unstated proposi-

tion that the decision of the Court of Appeals is right for the wrong reason. The Department argues in the alternative that, had the Court of Appeals addressed this issue, it would have concluded that Gillette's activities in Michigan established SBT jurisdiction under the Department's administrative PL 86-272 jurisdiction policy.[7]

At pp 17-23 and 32-43 of the Department's Brief, the Department argues extensively from the tax tribunal's findings of fact, as to various alleged Gillette activities. The Department fails to note that many of these findings of fact were challenged by Gillette in the Court of

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[7]The Department's Hearing Officer, before whom these issues were raised in informal conference, recommended that the Department conclude that it had no PL 86-272 jurisdiction, and dismiss the SBT assessments (Appendix E, App. 18). She correctly stated, among other reasons, that similar activities by Gillette had been held to be within PL 86-272 "solicitation" by the New York Court of Appeals and that the Department itself had concluded that such Gillette activities in 1974-1975 were within PL 86-272 permitted "solicitation." (App. 20)

Appeals, as incorrect, mistaken and/or not supported by competent, material and substantial evidence in the record.[8]

While Gillette would be pleased to brief and establish in this Supreme Court that the tax tribunal's findings of fact

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[8]The Department argues here that there were five types of activities by Gillette in Michigan which exceeded PL 86-272 "solicitation". The replacement of defective merchandise activity (Department's Brief, pp 34-37), which actually involved less than $4.16 worth of merchandise per salesperson per month, was found to be de minimis by the State's auditor, was purely to assist in soliciting sales and was entirely separate from the established procedures for dealing with defective or rejected merchandise (Appendix F, App. 21). The "actual sales" in Michigan argument (Department's Brief, pp 37-38) misrepresents the facts. These sales were made from a Gillette manufacturer in Illinois to an Illinois purchaser directing shipment from Illinois to its Michigan customer. The tax tribunal, aware of the actual facts, did not list this as an activity exceeding "solicitation." (See Appendix O to Gillette's Petition for a Writ of Certiorari, App. 222-223) (Appendix G, App. 37, contains the testimony on point) The Retail Advertising Agreements (Department's Brief, pp 35-41) were neither negotiated nor accepted by Gillette's salespersons in Michigan and the tax tribunal's finding of fact was wrong (Appendix H, App. 43, illustrates the unresolved issue on appeal). The "Merchandiser Activities" (Department's Brief, pp 41-43) were only established in 1976, not in the later years 1977-1981, and the tax tribunal's factual findings were likewise challenged as incorrect (App. 29-36). Lastly, the "commercial vehicle" argument, not relied upon by the tribunal (Department's Brief, pp 43-45) was challenged as meaningless (Appendix I, App. 47).

were blatantly erroneous on the record there established, and that the Department's factual assertions here are also not supported in the record, this would appear to be an issue better first dealt with by the Michigan appellate courts. The application of the PL 86-272 test to facts established by competent, material and substantial evidence in the record, particularly after this Court's instructive opinion in Wrigley, may not involve issues of sufficient jurisprudential significance to merit review by this Court. The 17 year retroactive enforcement by a state of a new, unforeseeable, far less favorable jurisdictional test against only one potential taxpayer, with all potential taxpayers similarly situated being permitted to avoid the new test, raises serious and significant constitutional issues meriting review by this Court.

## CONCLUSION

For the foregoing reasons, the petition for writ of certiorari to the Michigan Court of Appeals should be granted.

Respectfully submitted,

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December 1994

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**APPENDIX A**

STATE OF MICHIGAN

COURT OF APPEALS

THE GILLETTE COMPANY,

Appellant,

v

MICHIGAN DEPARTMENT OF TREASURY,

Appellee.
_____/

Court of Appeals No. 118660

MTT Docket Nos. 73916, 90676 90677

**REPLY TO APPELLANT'S SECOND SUPPLEMENTAL BRIEF**

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* * *

IV.

THE DEPARTMENT IS SEEKING A UNIFORM NEXUS STANDARD.

Although it is not an issue in this case, some taxpayers are contesting the question of whether PL 86-272 is the property nexus standard for the single business tax. Other taxpayers, including taxpayers represented by Appellant's counsel,[5] have argued that the mere solicitation of sales is sufficient for imposing the single business tax. There are currently pending before the Court two cases, which have been consolidated by the Court, in which the taxpayers contend that the mere solicitation of sales is sufficient nexus for a tax like the SBTA. Guardian Industries Corp v State of

[5]See Amicus Curiae Brief filed by Howmet Corporation in the case of Amway Corporation v State of Michigan, Department of Treasury, Supreme Court No. 85998.

Michigan, Department of Treasury, Revenue Division, Court of Appeals Docket No. 119601, and Cargill Inc, et al v Revenue Division, Department of Treasury, Court of Appeals Docket No. 120048.

These cases represent the opposite side of the coin. In this case Gillette, an out-of-state taxpayer, is maintaining that PL 86-272 shields the extensive activities which is conducts in Michigan from taxation. In contrast, in Cargill and Guardian, which involve a taxpayer shipping goods from Michigan to other states, the taxpayers claim that PL 86-272 is not applicable in determining whether they are taxable in other states because the SBT is not an income tax. Instead, they argue that mere solicitation of sales would make them taxable in other states. Obviously, Michigan taxpayers claiming to be taxable

in other states, unlike Gillette, would favor the extreme minimum standard.[6]

Because these cases involve the opposite side of the same coin, a uniform standard should apply. In its Single Business Tax Bulletin 1980-1, [Exhibit R-5], which was issued May 1, 1980, the Department indicated that it would use the cases decided under PL 86-272 to determine (1) whether an out-of-state business, such as Gillette, was subject to the SBT and (2) whether a Michigan taxpayer was taxable in other states for purposes of the sales factor of the apportionment formula.

* * *

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[6]If the taxpayer was taxable in other states, sales shipped from Michigan to customers in the other states would be eliminated from the numerator of the sales factor. The ultimate effect would be a reductio of the taxpayer's SBT liability even though no taxes were paid to the other states.

**APPENDIX B**

STATE OF MICHIGAN

COURT OF APPEALS

MICHIGAN CHROME & CHEMICAL COMPANY,

Plaintiff-Appellant, January 4, 1994

v No. 137977
L.C. No. 100771

DEPARTMENT OF TREASURY,

UNPUBLISHED

Defendant-Appellee.

Before: Griffin, P.J., and Connor and Corrigan, JJ.

PER CURIAM.

Plaintiff appeals as of right a judgment of the Michigan Tax Tribunal affirming tax assessments against it for the years 1979 through 1982 pursuant to Michigan's Single Business Tax Act (SBTA), MCL 208.1 et seq.; MSA 7.558(1) et seq. We affirm.

Plaintiff filed Michigan single business tax returns for the years 1979 through 1982 in which it apportioned its tax base for each year pursuant to § 45 of the SBTA, MCL 208.45; MSA 7.558(45). After an audit, defendant determined that plaintiff had improperly apportioned its tax base because it was not taxable in any other state. Defendant accordingly issued a final notice assessing an SBT deficiency of $64,064.00. Plaintiff appealed to the

tribunal, challenging the assessment. During those proceedings, defendant conceded that petitioner had satisfied its burden of proof relating to seven states in the 1981 tax year. Defendant also conceded that petitioner was taxable in Iowa in the tax years 1979 through 1982. In its opinion and judgment, the tribunal accepted the concessions and found that plaintiff had proven a sufficient nexus for Iowa from 1979 through 1982 and for seven states for 1981. The Tax Tribunal then modified the assessment for the 1979 through 1982 tax years, ordered defendant to recalculate the plaintiff's single business tax liability to account for the concession, and ordered the corrected assessment remitted within 60 days.

In the absence of fraud, our review of Tax Tribunal decisions is limited to whether the tribunal made an error of law or adopted an improper legal principle. Gillette Co v Dept of Treasury, 198 Mich App 303, 306; 497 NW2d 595 (1993); Dow Chemical Co v Dept of Treasury, 185 Mich App 458, 562-463; 462 NW2d 765 (1990). Moreover, we accepted the tribunal's fact findings provided they are supported by competent, material, and substantial evidence. Dow Chemical Co., supra at 462.

Plaintiff correctly points out that defendant and the tribunal made an error of law by improperly applying PL 86-272 as the governing standard. Gillette Co, supra at 309-310; Guardian Industries Corp v Dept of Treasury, 198 Mich App 363, 369; 499 NW2d 349 (1993). The proper standard for determining whether a taxpayer is taxable in other states for purposes of apportionment under MCL 208.42; MSA 7.558(42) is whether the imposition of the

single business tax on the taxpayer is permissible under the due process and interstate commerce clauses, US Const Am XIV; US Const, Art I, § 8, cl 3. Id. at 373. The Guardian case established that a plaintiff can satisfy the requirements of the due process clause by proving that it engaged in mere solicitation of sales in the state in question. Id at 379-380.

However, no remand for further proceedings is necessary on this record. Unfortunately, plaintiff failed to prove any definite link with other states for the years in questions, apart from those states as to which the defendant made the concessions. Plaintiff's president admitted that its sales representatives did not go into some states for three to four years. Plaintiff had also destroyed its business records of out-of-state sales. Plaintiff did not carry its burden of proving solicitation contacts with other states.

Nor need we address plaintiff's Commerce Clause challenge, because plaintiff failed to prove that its activities were sufficient to establish a substantial nexus with foreign states. Plaintiff failed to prove a physical presence in any foreign state for the years 1979 through 1982. Plaintiff was accordingly not entitled to exclude its sales in other states from its tax base under the SBTA.

In light of plaintiff's failure to sustain its burden of proof, we affirm despite the tribunal's use of inappropriate standards; see Gillette and Guardian, supra. In light of the failure of proofs, the outcome would remain the same.

Affirmed.

/s/ Richard Allen Griffin
/s/ Michael J. Connor
/s/ Maura D. Corrigan

**APPENDIX C**

STATE OF MICHIGAN

COURT OF APPEALS

THE GILLETTE COMPANY,

Petitioner, Appellant,

Court of Appeals No. 118660

vs.

MTT Nos. 73916, 90676 90677

MICHIGAN DEPARTMENT OF TREASURY,

Respondent, Appellee.

_____/

**APPELLANT'S ERRATA BRIEF**

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* * *

## VII.

**ONCE THE DEPARTMENT ADMITTED THAT IT HAD UNIFORMLY APPLIED THE PL 86-272 TEST FOR TAXABLE STATUS IN ALL YEARS AT ISSUE, THE TRIBUNAL ERRED BY APPLYING A DIFFERENT STANDARD TO DETERMINE WHETHER GILLETTE WAS TAXABLE IN MICHIGAN FOR THE YEARS 1976-1979**

The Tribunal's ruling concerning 1976-1979 adopted a standard for taxable status inconsistent with the longstanding positions of both Parties. While the Parties had disagreed as to how to interpret PL 86-272, not even the Department sought to tax Gillette based on the "solicitation alone" test of its first bulletin, RB 1978-3, subsequently withdrawn. The Department admitted that it had uniformly used PL 86-272 as its test for taxable status. (Answers to Petition ¶9-10). The Tribunal's use of RB 1978-3 for 1976-1979 is simply wrong.

This Court of Appeals need not consider whether PL 86-272 is the correct

test of taxable status in applying the Single Business Tax. PL 86-272 must be applied. To apply a less advantageous nexus test to Gillette than that which was by the Department's own admission uniformly it [sic] applied to all others, would deprive Gillette of equal protection of the law. See IBM v United States, 343 F2d 914 (Court of Claims, 1965); MCI Telecommunications Inc v Department of Treasury, 136 Mich App 28; 355 NW2d 627 (1984), lv den 422 Mich 883 (1985) and Armco Steel v Department of Treasury, 419 Mich 582; 358 NW2d 839 (1984). The Tribunal's use of RB 1978-3 for 1976-1979 is simply wrong.

* * *

**APPENDIX D**

STATE OF MICHIGAN

COURT OF APPEALS

THE GILLETTE COMPANY,

Appellant,

v

MICHIGAN DEPARTMENT OF TREASURY,

Appellee.
_____/

Court of Appeals No. 118660

MTT Docket Nos. 73916, 90676 90677

**BRIEF OF APPELLEE**

(Oral Argument Requested)

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* * *

A.

THE DEPARTMENT USES CASES DECIDED UNDER PUBLIC LAW 86-272 AS A GUIDE DETERMINING NEXUS.

As the Department's employees testified at the hearing, the Department uses cases decided under Public Law 86-272 as a guide to determine whether a business has sufficient nexus for imposition of the Single Business Tax Act. (SBTA). PL 86-272 prohibits states from imposing an income tax if the only activity conducted within the state is the solicitation of sales.

Because the SBTA is not an income tax, the Department of Treasury initially determined that PL 86-272 did not apply to SBTA and was not applicable in determining nexus. On March 24, 1978, the Department issued Single Business Tax Bulletin 1978-3 (Exh R-6). In the bulletin, the Department stated that it would follow the decision of

Scripto v Carson, 362 US 207; 80 S Ct 619; 4 L Ed 2d 660 (1960), in determining nexus.

After further analysis, the Department determined that the Scripto test was not appropriate.[2] Consequently, the Department issued Single business Tax Bulletin 1980-1 on May 1, 1980, indicating that it would use the cases decided under PL 86-272 as a guide for determining nexus. (Exh R-5). SBT Bulletin 1980-1 also identified

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[2]On page 10 of the Opinion and Judgment, the Tax Tribunal mistakenly suggested that the Department was using the Scripto v Carson standard in this case in concluding that Gillette's activities went ". . . beyond the Scripto v Carson [382 US 207 (1960)] case as utilized as a guide by the Department during 1978-1979." Contrary to the implication on page 10 of the Opinion and Judgment, the Department maintained throughout the case that the proper standard was PL 86-272, even for the years 1976-1979.

Later in its Opinion and Judgment the Tax tribunal specifically concluded that gillette's activities in Michigan exceeded the activities protected by PL 86-272 for all of the years at issue, 1976-1981. (Opinion and Judgment, pp 16 and 18).

specific business activities which would subject a corporation to the SBTA.

In 1986, the Multistate Tax Commission issued a resolution concerning the Adoption of Statement of Information Concerning Practices of Multistate Tax Commission States Under Public Law 86-272. Although the resolution was issued for informational purposes only, it provides additional examples of what activities exceed solicitation. (Exh P-5).

Since the enactment of PL 86-272, the U.S. Supreme Court has never determined what the term "solicitation" means or exactly what activities exceed solicitation. However, there have been many, many state cases which have applied and interpreted PL 86-272. Many of these cases have recognized that it is not possible to state with certainty what is or is not solicitation and that the determination of whether a corporation's

business activities exceed solicitation of sales requires a case-by-case approach focusing upon the totality of the business activities conducted within the state. Indiana Department of Revenue v Kimberly Clark Corporation, supra.

Many of the state courts have strictly and narrowly construed the term "solicitation". Miles Laboratories v Dept of Revenue, 274 Ore 395; 546 P2d 1081 (1975); Iron Frieman Mfg Co v State Tax Commission, 251 Ore 227; 445 P2d 126 (1968); Clairol Inc v Kingsley, 109 N J Sup 22; 262 A 2d 213; aff'd; 57 N J 199; 270 A 2d 702 (1970) cert den 402 US 902 (1971); Drackett Products Co v Kent Conrad, Tax Commissioner of the State of North Dakota, 370 NW2d 723 (1985). The legislative history of PL 86-272 supports the view that congress intended that "solicitation" be strictly and narrowly construed. See Senate Report No. 658 (August 11, 1959), 2

US Code Cong & Adm. News 2549, 2553 (86th Cong., First Session, 1959).

* * *

**APPENDIX E**

STATE OF MICHIGAN

DEPARTMENT OF TREASURY

INTER OFFICE

**DATE** September 17, 1981
**TO** Louis Wirbel, Chief Hearing Referee
**FROM** Mary J. Weseloh, Hearing REferee [sic]

SUBJECT OR FILE NO

| | |
|---|---|
| Gillette Company | RE: Single Business Tax |
| Prudential Tower Bldg. | Acct. 04-1366970 |
| Boston, MA 02199 | Intent to Assess B317729 |

Hearings were held in relation to the above captioned matter on May 22, 1979 and June 18, 1980. The taxpayer was represented by local counsel, Mr. Samuel J. McKim, by its Tax Attorney, Mr. Joseph J. Newpol, and by Supervisor of State and Local Taxes, Mr. Francis J. Arsenault. The department was represented by Mr. E. Lindstrom and Mr. T. Hoatlin.

The taxpayer does not believe that Michigan has either sufficient contacts or statutory authority to impose the SBT on its activities. The Intent sets out a 1976 deficiency arrived at through audit. Penalty for failure to file is also presented.

Mr. Lindstrom conducted a CIT audit at the same time as this SBT audit. No CIT deficiency was claimed because the department concluded that the taxpayer's

activities were protected by P.L.86-272. A jurisdictional standard other than P.L. 86-272 was in effect at the time of the SBT audit. During the first hearing the department noted that it intended to review its SBT jurisdictional standards. A public statement later resulted from the review. The public statement narrowed the SBT standard from the Northwestern Portland and Stockholm Valve decisions. As Mr. Hoatlin indicated during the second hearing the department now uses P.L.86-272 "plus".

In an April 20, 1981 letter from Mr. Hoatlin facts that the department contends would establish jurisdiction are outlined. The facts are based on information obtained from a current Department of Treasury employee who worked for the taxpayer in Michigan from 1975 through 1978. The taxpayer's June 4, 1981 letter gives its factual presentation. There is actually little disagreement of fact. The disagreement centers around a potential conclusion of "beyond solicitation" in light of the facts.

Do not be lulled into thinking that application of P.L.86-272 is the only issue that has been raised. The taxpayer's August 7, 1979 letter, written during the growth of the general jurisdiction issue, raises a statutory issue. The argument notes that the SBT is imposed upon taxpayers who have business activity in Michigan. According to the taxpayer business activity requires that transfer of title be made in Michigan or that services be performed in Michigan. The August 7, 1979 letter concludes that neither has taken place in the state. There is then no business activity upon which the SBT could be based.

## Conclusion

If application of P.L. 86-272 to the facts at hand were presented in a vacuum then the department would have had a chance. An appellate forum would only have had to develope [sic] a meaning to the term "solicitation." That issue, Michigan interpretation of solicitation, is too important to be litigated with this taxpayer. The issue would be diluted by CITs failure to find jurisdiction. It would be further diluted by New York's decision in Gillette v. State Tax Commission, 393 NYS 2d 186, 382 NE2d 764 (1979) (This taxpayer is one of the few multi-state taxpayers that has successfully litigated a P.L. 86-272 case.) The issue would be even further diluted by the taxpayer's "business activities" definitional issue.

The department's P.L. 86-272 "plus" argument simply doesn't have enough additions to off-set its poor posture. For this reason it is my recommendation that the Intent be cancelled.

Respectfully yours,

Mary J. Weseloh
Hearing Referee

MJW:cp

**APPENDIX F**

STATE OF MICHIGAN

COURT OF APPEALS

THE GILLETTE COMPANY,

Petitioner, Appellant

vs.

Court of Appeals
No. 118660

MTT Nos. 73916,
90676, 90677

MICHIGAN DEPARTMENT OF TREASURY,

Respondent.
_____/

**APPELLANT'S ERRATA BRIEF**

**ORAL ARGUMENT REQUESTED**

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* * *

**B. The Twelve Gillette Activities which the Tribunal Found Exceeded Permissible PL 86-272 "Solicitation"**

**1. Replacement of damaged or returned merchandise from the salesperson's stock.**

**a. The Tax Tribunal's finding of fact.**

"Salesmen had supplies of Gillette products in the trunks of their leased cars, which were used to replace damaged or returned products." (Op, p 16) [36]

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[36]The Tribunal had earlier stated that one of the duties of Gillette's salesman included replacing defective merchandise (Op, p 2), and that property of Gillette located in Michigan included some replacement merchandise (Op, p 5). At page 6 of its Opinion, the Tribunal found Gillette property in Michigan, for each of the tax years at issue, included car trunk replacement merchandise (which amounted to $46.96 per employee per year, see discussion, supra, pp 19-22). Property in Michigan also included other permissible merchandise plus the leased cars of Michigan Gillette solicitors, which accounted for the bulk of Gillette property in Michigan.

b. **What was established by competent, material and substantial evidence on the record?**

(1) **Was this activity established?**

The record established that there was a difference between what the Tribunal called "car trunk inventory" (Op, p 12) and "replacement merchandise" (Op, p 5). "Car trunk inventory" or "car stock" consisted of samples, free goods and promotional items (TR 774-748; Op, pp 5-6). All agree, car stock items which were given away by the salesperson did not amount to an activity exceeding "solicitation" (Exhibit P5, p 4 § 2; TR 971-972). Such items were never sold, and such a sale in Michigan would constitute grounds for the salesperson's dismissal (TR 726). In essence, such items were intended to be used as promotional items, but "very rarely" and on a "very limited basis,"

trunk stock samples or promotional items were used to replace a broken or defective item (TR 675, 744-746).

Auditor Horn established the amount of replacement merchandise involved with respect to the 1976 audit, Exhibit R-14, Schedule C-3, p 1. [37] Auditor Horn concluded that replacement goods utilized in Michigan amounted to $46.96 per employee per year (TR 137-138). Mr. Caruso believed this amount to be approximately correct (TR 744-746), and Auditor Gottleib likewise testified that only a very small de minimus amount was involved (TR 299-301). The very rare use of such extremely small amounts of car stock for replacement purposes was established as an exception, and necessary

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[37] The amount was established at $56,574.00 for the entire world. Horn used the Michigan sales factor percentage of 3.3% against the world wide replacement goods figure, and concluded that replacement goods utilized in Michigan wer [sic] $1,867 per year, which divided by the number of employees, gave rise to the amount of $46,96 [sic] per employee per year (TR 137-138).

in order to solicit sales from customers (TR 456-457 744-748). [38]

(2) **For what years was there evidence this activity existed?**

Such rare use of trunk stock for replacement took place in all years.

c. **Would such activity, if deemed established**

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[38] The testimony established a distinction between the replacement of damaged merchandise, a da minimis activity rarely engaged in by salespersons (discussed above), and the regularly carried on Gillette activity relating to the return of damaged or unacceptable merchandise. As to this latter activity, the return of such merchandise was to Gillette's Massachusetts home office, where the return was either accepted or rejected and where credits or other arrangements were made. No car stock replacement was involved. The Gillette Michigan salesperson had no authority with respect to returned goods, other than to assist in notifying the out-of-state home office that such goods would be returned. (See also TR 673-674, 683.) Mr. Mason, the Department's witness, described that the return procedure for smaller retailers and wholesalers consistend [sic] of tagging the merchandise to go back to the company (TR 429).

Deputy Commissioner Hoatlin testified that this procedure, with respect to the return of damaged merchandise, merely amounted to passing along a customer complaint - an activity within PL 86-272 "solicitation" (TR 1053-1054). The return (as opposed to the replacement from car stock) of damaged or unacceptable merchandise was not relied upon by the Tribunal in its findings of fact that Gillette's activities exceeded "solicitation," and is not an issue in this case.

**in the record, exceed P L 8 6 - 2 7 2 "solicitation"?**

Assuming, arguendo, that the use of part of a salesperson's car stock samples and promotional items in the State of Michigan to replace damaged, defective or unacceptable merchandise could constitute an activity not within PL 86-272 "solicitation", the "very rare" and "very limited" use of a salesperson's car trunk stock for this purpose should come under the de minimus exception to such a rule.

Several of the cases discussed above adopted the view that in applying PL 86-272, de minimus activities should not be considered. See US Tobacco, 386 A2d at 472; Kimberly Clark, 416 NE2d at 1268; Gray & Dudley, 365 SW2d at 34, 39; Coors, 517 P2d at 843; the Wisconsin Wrigley Case, CCH at 14,007. Even Dracket, 370 NW2d at 726, which adopted a narrow view of solicitation, recognized that minor

activities would not control. In US Tobacco, 386 A2d at 481 replacement of stale or damaged goods was specifically held protected. Also see NY Wrigley Case, Lexis, p 4; Wisconsin Wrigley Case, Appendix L, p 13,990; and Kimberly-Clark, 416 NE2d at 1267.

The Department's Auditor Gottleib testified that for his audit purposes he believed such replacement activity was de minimus and did not exceed PL 86-272 "solicitation". He testified that the de minimus approached as also applied by the other Department auditors with whom he spoke (TR 303-304; see Appendix N, Item 1). This is consistent with the de minimus rationale, and is the only competent testimony as to how the Department's

auditors audited for PL 86-272 solicitation purposes. [39]

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[39] Mr. Lynch, the SBT Administrator, however, denied that there was any published or unpublished Department policy whatsoever as to the application of the de minimus rule (TR 590-591). He personally advocated the absurd result which logically follows a refusal to recognize the de minimus concept. This is apparent from his cross-examination (TR 592-594):

"Q [McKim] Let me ask you this. If you had - just to understand where you come from, if you had a taxpayer let's say from Ohio hypothetically, who did nothing in Michigan that was without 86-272. Its activities were in each and every respect clearly with[in] 86-272 "solicitation", except one day its salesman, calling on a customer in Michigan to solicit sales found an irate customer with a ballpoint pen that wouldn't work and the salesman inspecting [expecting], hoping for a sale, an order from the customer said look it happens once in awhile. I've got a new one in my pocket or I've got a new one in my trunk[,] take it. Now give me the purchase order. Does that preclude in your judgment PL 86-272 as a shield from State taxation?

A If he exchanged property one time, I think the protection is lost. I think your example is the extreme, but my answer has to be that given there is no protection for it under PL 86-272.

Q And if the salesman said Mr. Lynch, if I didn't do that that man would have not placed the order. I would not have been able to solicit the sale. It's my part in my view of what I've got to do to get my customers to keep buying my product. Does that change your mind?

A No, sir.

* * *

On cross-examination, Deputy Commissioner Hoatlin, agreed with SBT Administrator Lynch that in his personal opinion there should exist no de minimus rule vis-a-vis a salesperson's replacement of damaged merchandise from car stock (TR 616-617). The positions of the Deputy Commissioner and the SBT Administrator are patently ridiculous. This could not conceivably have been the intent of Congress in enacting the PL 86-272 "solicitation" test.

2. **The activities carried on by 22 part-time Gillette Merchandisers.**

a. **The Tax Tribunal's findings of fact.**

"In 1976, Petitioner employed 22 part-time merchandisers. These merchandisers faced and dusted merchandise, proportioned all racks,

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Q It wouldn't matter whether the pen cost a dollar or even a dime in your opinion if [it is a] replacement technically of damaged merchandise[,] 86-272 is gone. Is that right?

A Yes."

shelves and displays, replaced damaged merchandise, etc. (See Exhibit R-16.) During 1977 to 1981, Petitioner employed a district manager and salesmen who performed activities which included merchandisers functions, but no merchandisers were employed in 1977." (Op, p 16) [40]

b. **What was established by competent, material and substantial evidence on the whole record?**

(1) **Was this activity established?**

(A) **The "Merchandisers".** Mr. Arsenault testified he had advised Auditor Gottleib that he believed generally that "merchandisers" took Gillette merchandise from the customers' back room or storage area to make sure it was displayed attractively and that the shelves were

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[40] Also at page 2 of its Opinion, the Tribunal stated that "[t]he merchandiser's function included placement of production [sic] on customer shelves and keeping management aware of product needs for inventory management." At page 3, the Tribunal referred to one full-time employee of Gillette North America, who, during 1980 and 1981, held the position of Senior District Merchandising Manager ("SDMM"), and who was a Dearborn, Michigan resident.

filled (TR 1098-1099). [41] Auditor Honor knew nothing whatsoever about the merchandisers' activities other than what Arsenault had told him (TR 156-157). Mr. Mason admitted that he never came into contact with merchandisers, but he believed they were used to assist the sales representatives (TR 438). Given that sales representatives do not have time to visit all stores, particularly when they sell to central offices or wholesalers, merchandisers provided assistance in this respect (TR 438). Mr. Mason, however, admitted that such activities were aimed at solicitation of more sales for Gillette and not at performing a service for the customer's customer, as the Department had maintained (TR 449). Mr. Gottleib testified solely based on what Arsenault

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[41] Arsenault also warned Gottleib to verify Arsenault's understandings as to such activities; Gottleib did not (TR 273). (See footnote, 70, pp 36-37.)

had told him, and from an undated "boiler plate" merchandiser job description (R-16, p 4-B1). [42] He found no merchandisers in Michigan during the 1977-1981 period he audited (TR 243-246, 324-325).

Therefore, what arguably the Department proved with respect to merchandisers in Michigan was that in 1976 they moved merchandise from the backroom to fill up shelf space, made certain Gillette goods were displayed attractively (TR 156-157), and encouraged the stores to purchase more Gillette products (TR 438-439).

(B) **Salesmen Taking Over Merchandisers Role**. There was no evidence whatsoever in support of the Tribunal's finding that Gillette's salespersons after 1976 "performed activities which included

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[42] The Tribunal's reference to Exhibit R-16 also apparently relies on the same job description. See discussion on the "job descriptions" the Department relied upon, infra, pp 36-37.

merchandisers functions" (Op, p 16). This aspect of the Tribunal's finding of fact is totally without evidentiary support. (See infra, pp 34-36, for discussion of setting displays).

(C) **The District Merchandising Manager**. Mr. Gottleib read into the record the "duties and responsibilities" of the District Merchandising Manager (TR 232) from the boiler plate job description dated September 1, 1981 (R-16, p 4-A1). On cross-examination, however, he admitted he had no proof that any of these activities were, in fact, carried on in Michigan between 1977 and 1981, the period of his audit (TR 329-334), particularly since he could not even establish that there were any merchandisers in Michigan during those years for the Manager to manage (see

Appendix N, Item 2).[43] The District Merchandising Manager, Mr. Kayner, was on the Department's witness list, but like Auditor Linstrom who believed PL 86-272 applied in 1974-1975, he was never produced by the Department.[44]

(2) **For what years was there evidence this activity existed?**

Mr. Horn testified regarding the tax year 1976 and stated that in 1976 Gillette had 22 part-time merchandisers in Michigan

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[43] There was no evidence that the Senior District Merchandising Manager, Kayner, "performed activities which included merchandisers' functions" as the Tribunal found (Op, p 16). Given that Mr. Kayner was the Senior District Manager of merchandisers, it is highly unlikely that he, himself, could or would attempt to perform the functions formerly performed by his 22 Michigan merchandisers.

[44] The competent evidence of record does not establish that Mr. Kayner performed any acts for Gillette in Michigan during the tax years at issue. This is entirely logical for the years 1977-1981, because he had no employees in Michigan to manage. He may have resided in Michigan, but an employee's residence, as opposed to his actions on behalf of his employer, has never been held to confer taxing jurisdiction over an employer otherwise not taxable in the state.

(TR 13-14). There is no competent evidence in the record that the merchandisers were present in Michigan from 1977 through 1981, the other tax years at issue. [45] Based on the evidence in the record, it is unclear whether any of the alleged activities of the District Merchandising Manager actually took place, or if they did, whether they took place in Michigan during 1977-1981. (See discussion above.)

The impact, if any, of Gillette merchandisers or its District Merchandising Manager in Michigan is, accordingly, limited solely to the year 1976.

c. **Would such activity, if deemed established in the record, exceed P L 8 6 - 2 7 2 "solicitation"?**

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[45] Although Mr. Gottlieb (TR 242) attempted to imply that merchandisers were in Michigan during 1977 or 1978, he later conceded on cross-examination that he was unable to place merchandisers in Michigan during the 1977-1981 years he audited (TR 324-325).

No. As was discussed supra, pp 14-18, such merchandiser type activities were precisely those undertaken and held taxable in Brown-Forman, 101 So2d 70, which had prompted PL 86-272. (The Brown-Forman employees sought to obtain suitable displays in stores of their customers' customers, in which they neither solicited nor accepted orders. By pushing the product in retail stores, Brown-Forman would sell more to its wholesale customers.) PL 86-272 was enacted to legislatively change that result. The activities of merchandisers have been considered and held within solicitation in the NY Gillette Case, see Appendix C, p 7 also see 393 NYS2d at 188; the NY Wrigley Case, Appendix K, Lexis p 4, US Tobacco, 386 A2d at 472, and the Wisconsin Wrigley Case, Appendix L at CCH 14006; and Kimberly-Clark, 416 NE2d 1266.

* * *

**APPENDIX G**

STATE OF MICHIGAN

MICHIGAN TAX TRIBUNAL

GILLETTE,

Petitioner(s),

-vs-

MICHIGAN DEPARTMENT OF TREASURY,

Respondent(s).

No(s): 73916, 90676 and 90677
JUDGES: Koney & Darnell
VOLUME VII
pp. 874 - 1039

The Hearing of above matter, taken before Sherry L. Sullivan, CSR 3334, Certified Shorthand Reporter, within and for the County of Macomb, State of Michigan, at 144 E. Lafayette, 13th Floor, Detroit, Michigan, on April 1, 1987 commencing at about 9:30 in the forenoon.

APPEARANCES:

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Appearing on behalf of Petitioner(s).

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Appearing on behalf of Petitioner(s).

* * *

D I R E C T E X A M I N A T I O N

BY MR. McKIM:

Q. Mr. Arsenault, you recall that you were on the stand as a witness for the Respondent earlier and you have been sworn and you're still under oath?

A. Yes.

* * *

Q. What was the essence of the sales tax audit that Mr. Horn first conducted at that time?

A. Sales and use tax, the sales tax portion of it was conducted at La Grange Park, Illinois a company which we referred to as Specialty and Industrial or Incentive, excuse me, which was a pen and printing business and I have to go back a little bit in a narrative for you. We acquired a

company called Autopoint which for an accountant would know that's the producer of a double-ended mechanical pencil. That company was acquired by Gillette in 1971 and it sold its product to end users who required the names to be put on the pen and they sold it through sales representatives. Those sales representatives made direct sales to end users. Autopoint charged the sales tax for Michigan and paid that sales tax. On or about 1974, maybe the beginning of 1975 that corporation was liquidated and merged into Papermate Company. Its method of doing business now transformed. It did not only, in fact it phased out its sales representatives and it sold through wholesalers. In my opinion, it need not have collected sales tax now because it would be selling subject to resale. There was a waning

end of direct sales and unfortunately or fortunately which ever the case might be, they, that company when it was liquidated re-registered as if they would be collecting the sales tax. Is that explanation enough?

Q. What is an end user?

A. You and I are end users of a product.

Q. Somebody who's not going to resell the product?

A. That's correct. And hopefully everybody in the room with respect to Gillette products.

Q. I'm not entirely clear yet on why the state said that -- did the state suggest that Gillette owed sales taxes?

A. What the sales tax auditor did is he took out a series of invoices. The invoices were to, all the ones that he selected were to Illinois wholesalers who issued to us an Illinois resell

certificate and asked that we drop shipped goods, via the common carrier, to a point within Michigan and Michigan auditor asked if we had a Michigan resale certificate for that delivery into state and we said we did not. We had the Illinois because we were selling to the man, wholesaler in Illinois. To the extent that we could not get from the Illinois wholesaler a Michigan resale certificate, we paid a sales tax on that sale.

Q. Were there any activities involved on behalf of Gillette by its salesmen selling the Autopoint product which went beyond the sort of the solicitation that you heard testified to by --

A. Do you want to say this again please.

Q. I'll try. Were there any activities involved by Gillette's salespersons selling the Autopoint product during

the years to which the sales tax audit related which went beyond the sort of the solicitation that you have described and that Mr. Caruso described?

A. No. They were not.

Q. Was inventory shipped from out of state?

A. Yes, it was.

Q. Any orders accepted in the state?

A. No orders were accepted in the state.

* * *

**APPENDIX E**

STATE OF MICHIGAN

IN THE COURT OF APPEALS

THE GILLETTE COMPANY,

Petitioner-Appellant,

vs.

Court of Appeals
No. 118660

MICHIGAN DEPARTMENT OF TREASURY,

Respondent-Appellee.
_____/

**APPELLANT'S SUPPLEMENTAL BRIEF**

**ORAL ARGUMENT REQUESTED**

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Telephone: (313) 963-6420

Dated: April 12, 1991

* * *

**4. The Retail Advertising Display Agreements With Gillette's Michigan Customers.**

The Department in this case has stated,

> "The fourth specific activity which exceeded solicitation was the Retail Advertising/Display Agreements between Gillette and its customers in Michigan .....
>
> As indicated on the Retail Advertising/Display Agreement (Exh R-51), the sales representative plays an integral role in the execution and performance of the agreement between the customers and Gillette. Under the terms of agreements the sales representative has authority to approve advertising. The customer must submit the Advertising/Display Agreement to the Gillette Sales Representative no later than 30 days after the performance date. Finally, the Agreement provides a space for the customer's signature and the Gillette salesman's signature. The activities concerning the Retail Advertising/Display Agreement, including execution of the agreement itself, are all activities which exceed the solicitation of sales." (Department's Brief pp 31-32).

The Department has again misrepresented the facts. It was clear

that the Gillette sales person sent the agreement to Massachusetts for acceptance, and performed only the role of explaining its use in Gillette sales promotions to the Gillette customer in Michigan. (Trial Transcript Volume VI, pp 777-781).

The Wisconsin Supreme held,

> "Regarding the advertising, it too is an important part of soliciting orders. As a medium to alert potential customers of the existence and availability of a company's product, the appearance of Wrigley's ads in Wisconsin are incidental to solicitation of orders for the product." (Wrigley slip opinion p 30).

The critical factor here is that Gillette's sales persons had no power to enter into an agreement in Michigan with Gillette's customers, and their involvement was to explain and facilitate Gillette's program to enable them to sell more Gillette products to their customers.[7] The

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[7]The Tax Tribunal, which heard the testimony on the so-called Retail Advertising/Display Agreements, did not refer to the Department's

parallel between the Wrigley and Gillette solicitation activities is obvious. This is because such organizations must engage in such activities to solicit the sale of their products. The Wisconsin Supreme Court was correct, the Michigan Tax Tribunal was wrong, this type activity clearly did not go beyond the permitted "solicitation" of orders, but rather were incidental to and a part of such solicitation of orders.

* * *

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assertions as an activity by Gillette which exceeded solicitation in Michigan. It is only the Department's misrepresentation of the facts in the record which would make it appear so here.

**APPENDIX I**

STATE OF MICHIGAN

MICHIGAN TAX TRIBUNAL

THE GILLETTE COMPANY,

Petitioner,

vs.

MTT Consolidated
Docket Nos. 73916,
90676, 90677

MICHIGAN DEPARTMENT OF
TREASURY,

Respondent.
_____/

**PETITIONER'S POST-HEARING CLOSING ARGUMENT AND BRIEF**

Respectfully submitted,

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Dated: August 10, 1987

* * *

6. **The 1981 Fuel Tax License**

The Department offered only the testimony of Mr. Thelen, an office manager in the Motor Fuel Tax Division of the Department of Treasury in connection with the fuel tax issue. Through him Exhibits R27 and R28 were introduced.

The Department's assertions that Gillette was doing something with a single truck in Michigan in the year 1981 came belatedly in this case, and are made by documents from which no such legitimate inference can be drawn. It is apparent only that a leasing company was involved, and that Gillette's name was used as the licensee. The testimony was that a single truck was apparently involved in a single year, although not what kind of truck or what type activity it was involved in. We do not know who owned the truck, how at all if the truck was leased, whose employee

drove the truck, where the truck traveled or what the truck did.

This is an excellent example of how far the Department will go to attempt by inference and innuendo to buttress its totally inadequate proofs that Gillette engaged in more than that "solicitation" permitted under PL 86-272. The Department has conducted at least four separate audits of this taxpayer, beginning in 1977 over ten years ago. Yet in this context, and recognizing the Department has the burden of proof of establishing jurisdiction, the Department attempts to cloud the issues with proofs so abysmally inadequate as these. This is both inadequate and unfair. Respondent proved nothing with these exhibits.

* * *